IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1695 OF 2002

Smt. Jaswanti Bhavishi & ors. ..Appellants

versus

Noor Mohm. S. Khan ..Respondent

Mr. R. S. Apte with Meena Fulbande for the Appellants.

Mr. Suresh Gole for the Respondent.

CORAM : D. G. DESHPANDE,J.

DATE : 6TH MAY,2005

ORAL ORDER :

1. This appeal is filed by the original defendants. I heard Mr. Apte for the Appellants - defendants and Mr. Gole for the Respondent - plaintiff.

2. The plaintiff- respondent had filed a suit against the present appellants for possession of the flat. The Defendants were trespassers according to him. They had no right to occupy the premises. The plaintiff was a tenant and not the owner of the property. Original defendant was Jayantilal Sangraj Bavishi. He died during the pendency of the suit

and present appellants being his heirs, were brought on record. The suit property is one room on the rear of flat No.2 on the ground floor of the property mentioned as Dar-Ul-Khaleel, bearing House No. 107/109 situate at Shahid Bhagatsingh Marg, Mumbai 400 001. The original defendant filed his written statement. He denied knowledge as to the plaintiff was the tenant. According to him Dr. Sohar was the tenant. Neither Dr. Sohar nor the plaintiff ever informed him as to how the plaintiff became tenant. The defendant was inducted in the year 1969 and using it for storage. The defendant admitted that he had shop in front portion of the building. After the death of the original defendant the legal heirs filed their short written statement accepting and adopting earlier written statement of Jayantilal Bavishi. The court framed issues with reference to the pleadings. Parties led evidence. Ultimately City Civil Court by judgment and decree dated 17.8.2002 decreed the suit of the plaintiff and ordered the defendant to deliver suit premises to the plaintiff. Hence, this appeal.

3. Mr. Apte for the appellants strenuously urged and contended that the plaintiff had no legal right in the suit property and has no legal right to dispossess the defendants. Secondly, the appellant was the sub tenant of Dr. Sohar. There was an

agreement between him and one Mr. Bhatt and therefore he was not liable to be evicted in the present suit. He also contended that if the original defendant was a trespasser, then there was no explanation why the plaintiff waited for four years, why in the meantime the plaintiff did not lodge report to the police and take any action or give any notice of trespass and encroachment to the original defendant. Mr. Apte filed compilation of documents. He also contended that the defendant had filed a suit for declaration of his right in the suit property before the Small Causes Court and the suit was pending for judgment and therefore till then the appeal should not be decided.

4. In the compilation of documents filed, there is a receipt dated 20.1.1988 in favour of the original defendant about having received Rs.1,000/- towards repairs and drainage, it is at Exhibit 4. Then, Exhibit ’5’ is an Inspection report submitted by the BMC in respect of room admeasuring 8’ x 12’ wherein the party was found keeping 18 tins of dry fruits along household goods in the premises of Ashok Bavishir, who was present at that time. Then insurance papers in the name of Bavisi Dry Fruit Stores. It is of 1969. Then some receipt issued by the insurance company to M/s. Bavisi Dry Fruit Store, and then by the Oriental Fire and General

Insurance Co. Ltd., then Shops and Establishment licence for the establishment of Bavisi Dry Fruit Stores, then Agreement dated 27.3.1980 between Smt. Hiralaxmi Prataprai Bhatt and Jayantilal Sangharaj Bavishi, purportedly to be in respect of the suit room. It is an agreement as a license. On the basis of these documents, Mr. Apte tried to contend that the appellants were licensees as such they are protected, and judgment of the trial court was required to be vacated.

5. Mr. Gole, however contended that nowhere in the written statement originally filed by the deceased defendant any such plea of tenancy or sub tenancy was raised. He drew my attention to the written statement of the defendant in that suit. Admittedly, there are no written statements except one filed by the original defendant. A perusal of the written statement of the defendant show that in paragraph 3 the defendant contended that the defendants have been on the premises ten years before the plaintiff came and they have been using the premises for storing purpose and no objection to this user has ever been taken by anybody. Then in paragraph 5 it is stated that the defendants have come into the premises lawfully with the permission and consent of those who were entitled to permission for occupation. Then in paragraph 6, the defendant

has stated that defendants are paying occupation charges to those from whom they have taken the premises, then in paragraph 7 it is stated that the defendants have taken the premises from person other than the plaintiff. Same allegations are repeated in paragraph 8 about taking possession of the premises from those who were entitled to give the same. Even the issues would show that there is no issue of any relationship of sub tenancy as between the defendant and the plaintiff. What is contended by the defendant from the issues is that deceased husband of Smt. Hiralaxmi widow of Prataprai Bhatt had granted leave and licence to the defendant with the stall.

6. Therefore, when the defendants have not raised in their written statement any plea that they are sub tenants of the plaintiff, they cannot be permitted to take the said defence now. Secondly, none of the documents brought on record by the defendants and/or referred to orally by him as above, shows such relationship between plaintiff and the defendant i.e. relationship of sub tenant. In the written statement as reproduced by me above, what the original defendant claim was user only of the suit premises and nothing more. Therefore, what is now being pleaded by the original defendant, cannot be permitted to be urged by the legal

representatives. If any contrary plea is raised by the legal heirs, then the heavy burden would lie upon them to prove. Admittedly, they have failed to discharge that burden. The defendants have tried to rely upon some agreement between Prataprai Bhatt deceased husband of Hiralaxmi. The finding of the trial court in that regard are in the negative and against the appellant. The entire evidence of the defendant has been scanned and scrutinised by the court and rejected.

7. It appears that deceased defendant was running a fruit stall and he was permitted to use the said room to keep his stock of fruits during night time. Then gesture defence on humanitarian grounds has now been tried to be exploited by raising false defence and false pleas. There is absolutely no right of the plaintiff in the suit property. The suit of the defendant pending before the Small Causes Court, as rightly argued by Mr. Gole has nothing to do with the right of the plaintiff. Plaintiff is not a party to that suit and he is not bound by any decision in that suit. In fact when the plaintiff applied for being joined as a party in Small Causes Suit that application was rejected on the ground that the suit before the Small Causes Court was not for the suit premises. If this is so, then the pendency of the suit in the

Small Causes Court again is no defence available to the defendant. Neither this appeal nor that judgment can be deferred or is required to be deferred till the decision of suit pending in the Small Causes Court.

8. My attention was invited by Mr. Gole to the evidence of Ashok Jayantilal Bawisi who was defendant No. 1-C i.e. son of the original defendant. Wherein he has admitted in paragraph 3 *that no suit has been instituted by us in the Small Causes Court in respect of the suit premises.* He had earlier stated that the suit is instituted against the wife of Prataprai Bhatt. Then my attention was drawn to further admission given by the said witness wherein he has stated that it is my case that we claim no declaration of tenancy from the Small Causes Court in respect of the suit premises. Then in the cross examination this witness further admitted that except the rent receipt produced he had no document to show that Prataprai was there in the suit premises. It is pertinent to note that even the defendant did not examine anybody to prove the agreement of leave and licence. They are not certain as to from whom they took the premises because in cross-examination of this witness he has stated that they had taken the premises in a manner that on their request and

accompanied by Prataprai. The keys were taken from Dr. Sachet. Same person appears to have been referred to as Dr. Sachet or Dr. Soher. Then this witness was contradicted with the written statement of his father wherein the father has stated that suit premises were used for storing purposes. But according to the witness they were used for residence. He admitted that there was no leave and licence agreement between him and Dr. Sachet, and as far as he knew there was no last such agreement of October 1985 between Dr. Sachet, Heeralaxmi and defendant.

9. The ration card which is tried to be brought on record is of 1995 and not prior thereto. He admitted that there was no separate electric meter for the suit premises and he also admitted that except rent receipt issued by Dr. Sachet (the rent receipts were denied and disputed by the Plaintiff). There was no evidence with them to show that they were in the suit premises before 1981. Therefore, this is the evidence of the defendant and it is absolutely unworthy of reliance. The trial court in its well reasoned judgment has rightly and properly scrutinised the evidence and has rejected the case of the defendant. So many documents purported to be signed by Dr. Sachet or Dr. Soher have not been proved or in the handwriting of Dr. Sachet. No

connection of Dr. Sachet or Dr. Soher is shown by the defendants to the suit premises. They are claiming from one Bhatt whose connection with the suit premises has also not been shown or proved. Therefore, in the circumstances, this appeal is required to be dismissed.

ORDER

. Appeal is dismissed with costs all throughout.

. Amount deposited by the Appellants in this court towards mesne profits shall be paid over to the Respondents.

6.05.2005 (D.G. DESHPANDE, J.)